IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

RECEIVED
NOV 19 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 74-364

UNITED STATES OF AMERICA, Petitioner

v.

WILLIAM G. HALE, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, William G. Hale, asks leave to proceed in forma pauperis and to file a single typewritten copy of Respondent's Brief in Opposition to Petition for Certiorari to the United States Court of Appeals for the District of Columbia Circuit, pursuant to Rule 53.

The affidavit of petitioner's counsel in support of this motion is attached hereto.

Larry J. Ritchie

LARRY J. RITCHIE
Counsel for Respondent
(Appointed by the United States Court of Appeals for the District of Columbia Circuit)
Georgetown University Law Center
600 New Jersey Avenue, N. W.
Washington, D. C. 20001

BEST COPY AVAILABLE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-364

UNITED STATES OF AMERICA, Petitioner

v.

WILLIAM G. HALE, Respondent

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

I, Larry J. Ritchie, being first duly sworn according to law, depose and say, in support of respondent's motion for leave to proceed in forma pauperis:

1. I am counsel for respondent William G. Hale in the above-entitled case, having been appointed by the United States Court of Appeals for the District of Columbia Circuit.

2. Despite diligent efforts to reach the respondent since receiving notice of the government's Petition for Writ of Certiorari, I have been unable to contact him.

3. The United States Court of Appeals for the District of Columbia Circuit granted the respondent leave to proceed in forma pauperis as appellant before that court on the basis of respondent's affidavit that he was unable to pay fees, costs or security therefor.

4. Because I believe in the truth of respondent's affidavit before the United States Court of Appeals and because I am unaware of any facts that would indicate that the respondent is not still impoverished, I believe that he is unable to pay fees, costs or security therefor in the above-entitled case.

5. I believe that respondent is entitled to effectively present his opposition to the petition for certiorari in said case.

6. The nature of said case is breifly stated as follows:

The respondent was tried and convicted of robbery under 22 D.C. Code § 2901 (1971) before the United States District Court for the District of Columbia. He appealed this conviction to the United States Court of Appeals for the District of Cclumbia Circuit. The United States Court of Appeals reversed his conviction on the ground that respondent, who testified at his trial, was improperly cross-examined on his silence at the time of his arrest. The United States of America has petitioned this Court for a writ of certiorari.

Larry J. Ritchie

LARRY J. RITCHIE, ESQUIRE
Counsel for Respondent
Georgetown University Law Center
600 New Jersey Avenue, N. W.
Washington, D. C. 20001

Duly witnessed and sworn to
before me, a Notary Public,
this 19th day of November
1974.

Anna B. Fuson

NOTARY PUBLIC, D. C.

Comm. Exp. - 3/14/77.

NOV 19 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-364

UNITED STATES OF AMERICA, Petitioner

v.

WILLIAM G. HALE, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

BEST COPY AVAILABLE

LARRY J. RITCHIE, Esquire
Georgetown University Law Center
600 New Jersey Avenue, N. W.
Washington, D. C. 20001

Counsel for Respondent
(Appointed by the United States Court of Appeals for the District of Columbia Circuit)

November 19, 1974

INDEX

	Page
QUESTION PRESENTED	1
STATEMENT	2
ARGUMENT	3
CONCLUSION	11

CITATIONS

Cases:

Fagundes v. United States, 340 F.2d 673 (1 Cir. 1965)	10
Fowle v. United States, 410 F.1d 48 (9 Cir. 1969)	9
Gillison v. United States, 399 F.2d 586 (D.C. Cir. 1968)	10
Griffin v. United States, 336 U.S. 704 (1949)	4, 11
Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957)	6, 10, 11
Johnson v. Patterson, 475 F.2d 1006 (10 Cir. 1973)	10
Kelly v. United States, 99 U.S. App. D.C. 13, 236 F.2d 746 (1956)	8
Naples v. United States, 120 U.S. App. D.C. 123, 344 F.2d 508 (1964)	6, 8
O'Hearn v. State, 79 Neb. 513, 113 N.W. 130 (1907)	8
People v. Simmons, 28 Cal. 2d 699, 172 P.2d 18 (1946)	6, 7
Pinkard v. United States, 99 U.S. App. D.C. 394, 240 F.2d 633 (1957)	8
Skiskowski v. United States, 81 U.S. App. D.C. 274, 158 F.2d 177 (1946)	8
State v. Hester, 137 S.C. 145, 134 S.E. 885 (1926)	8
United States v. Anderson, 498 F.2d 1038 (D.C. Cir. 1974)	3

Miscellaneous:

McCORMICK, EVIDENCE (1972)..... 5, 6

Proposed Federal Rules of Evidence..... 5, 6

Note, "Tacit Criminal Admissions," U. Penn. L. Rev. 210 (1963)..... 5

WIGMORE, EVIDENCE (1972)..... 5
(Chadbourn rev. 1972)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-364

UNITED STATES OF AMERICA, Petitioner

v.

WILLIAM G. HALE, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit was correct in its ruling that as a matter of local evidentiary law, a defendant who has given exculpatory testimony at trial cannot be cross-examined as to why he failed to offer such information at the time of his arrest.

2. Whether the Fifth Amendment bars cross-examination of a defendant who has given exculpatory testimony at trial as to why he failed to offer such information at the time of his arrest.

STATEMENT

Along with a co-defendant, the respondent was tried by jury in the United States District Court for the District of Columbia for robbery, in violation of 22 D.C. Code § 2901 (1967). The respondent testified on his own behalf—denying guilt, offering an alibi, and asserting that $158 found in his possession after his arrest was money that his wife had given him in order to purchase money orders for her (Tr. 217-19). He had previously been arrested on a narcotics charge (Tr. 253-54). On cross examination, the prosecutor questioned him about his silence at the police station to which he was brought after his arrest (Tr. 259-260):

> Q. When did they [the police] inform you of the charge?
>
> A. When I was at the precinct.
>
> Q. Did they search you?
>
> A. Yes, they did.
>
> Q. Did you in any way indicate where that money came from?
>
> A. No, I didn't.
>
> Q. Why not?
>
> A. I didn't feel that it was necessary at the time.
>
> Q. You were advised of your rights, were you not?
>
> A. Yes.
>
> THE COURT: He is not required to indicate where the money came from. There is no responsibility on his part in regard to that.
>
> DEFENSE COUNSEL: Thank you, your Honor.
>
> COUNSEL FOR CO-DEFENDANT: I ask that the question and answer be stricken.
>
> THE COURT: I indicated to the jury that it is clearly an inappropriate question. You may disregard it, ladies and gentlemen. The defendant is not required to give any explanation whatsoever at the time of his arrest.
>
> PROSECUTOR: If he was asked the question--
>
> THE COURT: I have ruled, sir.
>
> PROSECUTOR: All right, your Honor. Fine.

Later, at the bench, counsel for respondent moved for a mistrial because of this questioning (Tr. 261-262):

> DEFENSE COUNSEL: ... I think questioning into whether or not he [respondent] explained where the money came from was highly improper as the Court pointed out. I am not at all sure that an instruction to the jury could cure that.
>
> THE COURT: Do you have any evidence that he gave a contrary statement to the police.
>
> PROSECUTOR: They asked him, "Where did you get the money?" He couldn't account for it.
>
> THE COURT: What did he say?
>
> PROSECUTOR: He wouldn't say anything. He couldn't account for it. They asked him whether he was working or wasn't working. He wouldn't indicate.
>
> . . .
>
> THE COURT: ... Your motion for mistrial is denied.

These are the only portions of the record that are pertinent to the question presented.

The jury voted to convict, but the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the cross-examination of the defendant had been improper. United States v. Anderson, 498 F.2d 1038 (D.C. Cir. 1974).

ARGUMENT

1. The Court of Appeals held that, as a matter of evidentiary law, a defendant who has given exculpatory testimony at trial cannot be cross-examined as to why he failed to offer such information at the time of his arrest, stating:

> In sum, application of the principles enunciated in Grunewald compels a finding that, as a matter of law, there was nothing inconsistent between

> Hale's silence in interrogation and his alibi at trial. Thus, the basic premise required for triggering the Harris rationale is absent. [498 F.2d at 1043, footnotes omitted].

The court also found such cross-examination to be constitutionally impermissible, stating:

> Even if it could be said that appellant's silence at the police station was inconsistent with his testimony at trial, Harris would nevertheless be inapplicable in the present circumstances. [498 F.2d at 1043].

2. Mr. Hale was convicted of robbery in violation of 22 D. C. Code § 2901. The district court was trying a case brought under a statute which applies only to the District of Columbia and thus was sitting as a local court. See Griffin v. United States, 336 U.S. 704 (1949).[1/] As a local court, the rules of evidence which would apply would not be federal rules of evidence; they would be matters of local law as are the rules of evidence prevailing in the state courts. Griffin v. United States, 336 U.S. 704, 709 (1949).[2/] As stated in Griffin, 336 U.S. at 717: "[T]he law of evidence and procedure governing criminal trials in the District of Columbia is in the keeping of the Court of Appeals for the District and is not to be exercised by this Court."

1/ In fact, this Court has been at pains to point out that "Congress ... recognized the expediency of separate provisions" pertaining to criminal justice applicable exclusively to the District of Columbia in contradistinction to the Criminal Code governing offenses amenable to federal jurisdictions elsewhere. Johnson v. United States, 225 U.S. 405, 418. Griffin v. United States, 336 U.S. 704, 713 (1949).

2/ As stated in Griffin at page 717:

> [I]t has become settled practice for this court to recognize that the formulation of rules of evidence for the District of Columbia is a matter purely of local law to be determined—in the absence of specific Congressional legislation—by the highest appellate court for the District.

3. A uniformly recognized principle of evidence is that the credibility of a person who takes the witness stand to testify may be impeached by the showing of a prior inconsistent statement made by the witness. McCORMICK, EVIDENCE §§ 34-37 (1972). Whether silence can amount to a statement depends on the factual circumstances of the case.[3/] Whether a failure to assert a fact will amount in effect to an assertion of the non-existence of the fact depends on whether it would have been natural under the circumstances to assert the fact. III A WIGMORE, EVIDENCE § 1042 (Chadbourn rev. 1972). Identical considerations apply to the determination of whether silence can be used as a tacit admission (adoption of the statement of another by silence). IV WIGMORE, EVIDENCE § 1071 (Chadbourn rev. 1972).[4/] In both situations, prior to the introduction of silence as a statement, it must be found that there was a confrontation or a statement made by another which would under the circumstances naturally call for a reply.

Whenever there is a preliminary question of fact which must be determined prior to the introduction of evidence, the factual question is to be decided by the judge outside of the hearing of the jury. Proposed

---

3/ The Proposed Federal Rules of Evidence, Rule 801(a) define "statement" as follows: "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."

4/ See also Note, "Tacit Criminal Admissions", 112 U. Penn. L. Rev. 210, 215-16 (1963), where it is stated:

> [C]ourts generally have imposed seven conditions for the introduction of evidence that an alleged admission by silence occurred. If silence is the only response by the defendant, the accusation must have occurred (1) in the defendant;s presence and (2) within his hearing; (3) he must have understood it; (4) it ordinarily must have embraced facts within his personal knowledge; (5) he must have been physically able to speak and (6) psychologically at liberty to speak; and (7) the statement and surrounding circumstances must have naturally called for a reply. [footnotes omitted].

Federal Rules of Evidence, Rule 104.[5] In this case, there was never any showing by the government that a statement had been made or a question directed to Mr. Hale by the police officers. The only proffer of any sort by the government was the response to the court's question during the bench conference at which the motion for a mistrial was made. (Tr. 261-262).[6] It would thus appear from the record and from

---

5/ "[T]he question of fact whether the party's conduct manifested his assent to the statement of the other person is a preliminary question for the judge. Unless he so finds, the statement is excluded." [footnote omitted].

Naples v. United States, 120 U.S. App. D.C. 123, 344 F.2d 508, 512 (1964) [quoting from McCORMICK, EVIDENCE, § 246, at 527 (1964)].

> It is of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness. But this can be done only if the judge is satisfied that the prior statements are in fact inconsistent. 3 Wigmore, Evidence, § 1040. [emphasis added].

Grunewald,v. United States, 353 U.S. 391, 418-19 (1957).

> The theory underlying this rule is that the natural reaction of an innocent man to an untrue accusation is to enter a prompt denial. Where his response is silence, envasion, or equivocation, it is for the trial court to determine in the first instance whether the accusation has been made under circumstances calling for a reply, whether the accused understood the statement, and whether his conduct or response was such as to give rise to an inference of acquiescence or guilty consciousness. Where the trial judge determines that such an inference may be drawn, the statement is then admitted, not as substantive evidence in proof of the fact asserted but merely as a basis for showing the reaction of the accused to it.

People v. Simmons, 28 Cal.2d 699, 172 P.2d 18, 25 (1946).

6/ As stated by Judge Wilkey in his dissenting opinion below, 498 F.2d at 1047:

> Reg. 'fully, I must point out that the dialogue—in quotes—my colleagues cite in the text at note 7 and in note 12, as testimony as to what defendant Hale said

the manner in which the question presented is phrased in the petition for certiorari, that the government's position is that a suspect under arrest would naturally volunteer exculpatory information to the police.

Even assuming that there was a question directed to Mr. Hale by the police, before the prosecutor can use his silence as a statement, the circumstances must have been such that it would have been natural to reply. The circumstances were that Mr. Hale had just been arrested on the street for robbery, taken into the police station, searched, and advised of his right to remain silent. It should also be noted that Hale was no stranger to police procedures, having been arrested on a previous occasion.

Many jurisdictions have adopted a "per se" rule that the arrest of an accused excludes evidence of a subsequent admission by silence.

As stated in People v. Simmons, 28 Cal.2d 699, 172 P.2d 18, 26 (1946):

> It is also apparent that when a person is in the hands of his accusers he may well and soundly conclude that his best interests will be served by silence, evasiveness, or equivocation. For this reason, in a number of jurisdictions it has been held that the mere fact of arrest is sufficient to render inadmissible the fact of the accused's failure to deny accusatory statements when made in his presence and hearing. These courts maintain that it is the common knowledge and belief of men in general that silence while under arrest is most conducive to the welfare of an accused whether he be guilty or innocent; that the maintenance of silence is the best strategic policy for one in the custody of the law, and that it entirely consistent with innocence. [citations omitted].

(Fn. 6 cont.) in answer to police questioning, is not evidence at all. Hale never testified to this, no police witnesses testified to this, the jury never heard any such words. The "dialogue" is lifted from a bench conference at which the Assistant U.S. Attorney purported to give his belief as to what occurred at the police station. The jury never would have been permitted to receive any such hearing from the prosecutor, who of course was never there.

In Kelly v. United States, 99 U.S. App. D.C. 13, 236 F.2d 746, 749 (1956), the court discussed some of the motives which might cause an accused under arrest to remain silent in the face of accusation. The court quoted from the case of State v. Hester, 137 S.C. 145, 185, 134 S.E. 885, 898-899 (1926):

> [I]t cannot be disputed that many people, and even persons who are entirely innocent of wrongdoing, are afraid to talk in the presence of detectives. We must not forget, too, that from time immemorial it has generally been conceded an unwise thing for those charged with criminal offenses to talk to anybody and everybody about their cases, and especially to engage in conversation with those who may not be friendly to them. For years and years the members of the bar have cautioned their clients not to discuss their cases with those with whom they came in contact, unless absolutely assured of their friendship, and many good lawyers have advised clients to refrain from talking at all. This has been the practice so long that it has become a well-known fact to our people generally.

The court also quoted from the case of O'Hearn v. State, 79 Neb. 513, 522, 113 N.W. 130, 134 (1907):

> [T]he very surroundings of the accused in such cases are such as to render it entirely proper and natural for him to keep silent in the fear of misquotation or misconstruction. A person in such a situation would naturally fear that the worst possible interpretation would be placed upon his language, that the memories of those present would to statements prejudicial to his interests, and that an officer seeking to convict might supply through zeal any defect in the statement which was actually made.

Apparently, the District of Columbia has not adopted the "per se" rule in the tacit admissions area, but would look to all of the surrounding circumstances. In Naples v. United States, 120 U.S. App. D.C. 123, 344 F.2d 508, 511 (1964),[7/] the court stated:

7/ See also Pinkard v. United States, 99 U.S. App. D.C. 394, 240 F.2d 633 (1957); Skiskowski v. United States, 81 U.S. App. D.C. 274, 158 F.2d 177 (1946).

> Testimony that an accused adopted statements of another person as his own admissions may be let in under this exception [adoptive admissions] if it clearly appears that the accused understood and unambiguously assented to those statements.

There is, however, an additional factor (other than arrest) involved in Mr. Hale's case—he was told by the police officer that he had the right to remain silent and that anything which he said could be used against him. Particularly in view of this warning, as an evidentiary matter, silence at the police station after his arrest is not inconsistent with Mr. Hale's offering of exculpatory testimony at his trial. There is simply no inconsistent statement for use as impeaching material.

In Fowle v. United States, 410 F.2d 48 (9 Cir. 1969), the defendant, accused of a narcotics violation, took the stand in his own defense and testified to certain exculpatory facts. The prosecutor on cross-examination inquired into the defendant's silence at the time of his arrest. The Ninth Circuit (like the D.C. Circuit in Hale) reversed the conviction on two grounds—the evidentiary point and the constitutional issue. In discussing the principle of evidence law, the court at page 50 stated:

> A person's silence in most circumstances is so highly ambiguous that it is generally inadmissible, for its lack of probative value, on the question of whether, by his silence, that person has expressed agreement or disagreement with contemporaneous statements of others. One situation in which silence has been deemed more meaningful and thought to be so significant as to have probative weight is the case wherein it persists in the face of accusation. It has been assumed that an accused, in such circumstances would, more likely than not, dispute untrue accusations. It was upon this implicit assumption that the Raffel court held that the prior silence of the accused was admissible. There are, however, situations in which an accused is clearly under no duty to speak and where there are

> important reasons, regardless of guilt or innocence, for his maintaining silence. In such circumstances, since innocent and guilty alike may choose to stand mute, silence, even in the face of accusation, is highly ambiguous; hence, proof of such former silence should be excluded under universally recognized principles of evidence [citations omitted].

Considering the prosecutor's use of Fowle's silence as purely a question of evidence law, the court found a solid basis for reversal. 410 F.2d at 51.

Having been arrested and warned of his right to silence and that anything he said could be used against him, it is impossible to say that Mr. Hale would naturally have replied to questions put to him by police officers, by offering exculpatory information which he later offered at trial. As stated in Fagundes v. United States, 340 F.2d 673, 677 (1 Cir. 1965):

> When one takes the stand in his own defense he of course puts his credibility as a witness in issue. Nevertheless we think it reversible error to permit evidence of refusal to talk and of request for counsel on arrest to be used for the purpose of impeachment. In the first place such evidence is ambiguous. Fagundes' words when arrested can as well be taken as indicating reliance upon constitutional rights as supporting an inference that his ability was an afterthought. There is nothing to indicate which interpretation is more probable. Cf. Grunewald v. United States, 353 U.S. 391, 415-524, 77 S.Ct. 963, 1 L.Ed. 2d 931 (1957).

See also Johnson v. Patterson, 475 F. 2d 1006, 1068 (10 Cir. 1973); Gillison v. United States, 399 F.2d 586 (D.C. Cir. 1968).

4. In Grunewald v. United States, 353 U.S. 391, 420 (1957), relied on by the court below, this Court found improper the cross-examination of a defendant as to his silence before a grand jury because, in the circumstances of the case, the probative value on the issue of credibility was so negligible as to be far outweighed by its

possible impermissible and prejudicial impact on the jury. In that case, the Court was reviewing the federal rules of evidence and was exercising its supervisory control over the federal courts. The decision in the Hale case is not in conflict with Grunewald—indeed, it relies on the Grunewald decision. However, in any event, the District of Columbia Court of Appeals was sitting in Hale as a local court passing on local rules of evidence. See Griffin v. United States, 336 U.S. 704 (1949).

The constitutional considerations descussed by the court in the Hale case are unnecessary to its decision and do not have to be reached. If this Court were to accept certiorari in this case, the issue of whether the prosecutor's question was constitutionally permissible would not be reached because of the proper disposition of the case by the court below on local evidentiary principles. Indeed, the Court would be faced again with much the same situation posed in the Griffin case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Larry J. Ritchie
LARRY J. RITCHIE
Counsel for Respondent
Georgetown University Law Center
600 New Jersey Avenue, N. W.
Washington, D. C. 20001

November 19, 1974